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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 494

MARINE TRANSPORT LINES, INC., and
MARINE NAVIGATION COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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October 10, 1956

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UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

Marine Transport Lines, Inc., Marine Navigation Company, Inc. and Pacific Far East Line, Inc. pray that writs of certiorari issue to review the final judgments and orders of the United States Court of Claims entered in the above cases on July 12, 1956.

Opinions Below

The order of July 12, 1956 of the Court of Claims, in which it included its judgment and which disposed of both cases (R. 27), is not reported and is printed in the Appendix hereto, page 5a, *infra*. This order dismissed the petitions for the reason set forth in an opinion concurrently rendered in the case of *Smith-Johnson Steamship Corp.* v. *United States of America*. That opinion is reported at 142 F. Supp. 367 and is printed in the Appendix hereto, pages 6a-8a, *infra*. The latter opinion reversed the position of the Court taken in two earlier opinions on March 6, 1956. These are reported at 139 F. Supp. 298 and 139 F. Supp. 301. Both opinions are printed in the Appendix hereto, pages 9a-17a, *infra*.

Jurisdiction

The date of the judgments and orders of the Court of Claims is July 12, 1956 (R. 27). Appendix, pages 5a-8a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Questions Presented

28 U. S. C. 1491 confers jurisdiction upon the Court of Claims of any "claim against the United States founded either upon the Constitution or any Act of Congress". Petitioners brought suit in the Court of Claims for an accounting of profits paid to the United States under bare-boat charter agreements authorized by section 5 of the Merchant Ship Sales Act of 1946. Section 5(c) of that

Act incorporated section 709(a) of the Merchant Marine Act, 1936. The latter section prescribed the profit sharing terms. Petitioners allege that the United States exacted from them amounts in excess of the shares specified in section 709(a).

The bareboat charter agreements covered groups of vessels. The expenses and profits in the operation of these vessels were merged in the accounting of profits so that the profits could not be attributed to any identifiable vessel. Consequently, a libel *in rem* would not lie if the ships had been privately owned. The questions presented are:

(1) Whether the Suits in Admiralty Act is applicable to a suit for an accounting of profits where there is no identifiable vessel that could have been libelled; (2) assuming that, in these circumstances, a suit in admiralty could be maintained against the United States, whether the Court of Claims does not concurrently retain its long-established jurisdiction of claims, such as these, founded upon an Act of Congress.

The Statutes Involved

The statutes involved are 28 U. S. C. 1491; the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, 742; the Merchant Ship Sales Act of 1946, Section 5, 60 Stat. 43, 61 Stat. 191, 50 U. S. C. App. 1738; and the Merchant Marine Act, 1936, Section 709(a), 49 Stat. 2010, 46 U. S. C. 1199(a). These appear in the Appendix, pages 1a to 4a, *infra*.

Statement

Petitioners are two of forty-six companies which brought suit in the Court of Claims for the recovery of excessive amounts of profit exacted by the United States allegedly in violation of section 709(a) of the Merchant Marine Act, 1936.

The charter agreements were drafted by the United States Maritime Commission and petitioners were required to sign these agreements before they could receive any vessels under bareboat charter. The charter agreements provided that petitioners pay to the Maritime Commission and its successor, the Maritime Administration, as its share of profits, an amount in excess of the 50 percent prescribed under section 709(a) of the Merchant Marine Act, 1936.

Pursuant to the charter agreements, petitioners made preliminary payments of portions of their profits as additional charter hire. In order to ascertain petitioners' obligations for additional charter hire it was necessary to total the income from the operations of all the chartered vessels, subtract the total expenses and overhead and to deduct from the balance an amount equal to a 10 percent return on the charterer's capital necessarily employed. The resultant figure was then divided by the total number of voyage days of all the chartered vessels. This produced an average voyage profit from which the Government was paid on the following basis (Appendix, pages 11a-12a):

Cumulative net voyage profit	Government's share
up to and including $100—per day	50 percent
more than $100 but not more than $300—per day	75 percent
more than $300—per day	90 percent

The amounts payable to the Government were thus based upon the average voyage day income of a group of vessels. No part of this amount could be attributed to any single vessel.

It was common ground between petitioners and defendant that petitioners' suits were founded upon Acts of Congress. Defendant, however, relied upon a special defense of lack of jurisdiction of the subject matter. Defendant moved for summary judgment in *Marine Transport Lines* (R. 9) and moved to dismiss for lack of jurisdiction in *Pacific Far East Line* (R. 25). Its motions in both cases were denied below on March 6, 1956 (R. 9, 25), the Court holding that, the action being based on statute, it had jurisdiction. The Court also held that the action was not maritime and not cognizable in admiralty.

On defendant's motion the Court below on July 12, 1956, on the authority of *Sword Line, Inc.* v. *United States,* 351 U. S. 976, reversed its position and dismissed the petitions for lack of jurisdiction (R. 27). Certiorari is sought to review the decision of the Court below.

Reasons for Granting the Writ

Smith-Johnson Steamship Corp., one of the forty-six companies which filed suit in the Court of Claims for the recovery of excessive amounts of additional charter hire allegedly exacted by the Government in violation of statute, filed a petition for a writ of certiorari in this Court on August 28, 1956, Docket No. 353. That petition fully states the position of the instant petitioners with respect to the second question presented, namely, whether the Court of Claims does not concurrently retain its long-established jurisdiction of claims, such as these, founded upon an Act of Congress, even if, in the circumstances of these cases,

there is jurisdiction in admiralty under the Suits in Admiralty Act.

In the interest of brevity, the instant petitioners respectfully beg leave to rely upon the statement of facts and the reasons for granting the writ contained in the *Smith-Johnson* petition. Petitioners here will refrain from burdening the Court with a repetition of the statement and reasons therein contained.

With respect to the first question presented, to wit, whether the Suits in Admiralty Act is applicable to a suit for an accounting of profits where there is no identifiable vessel against which a libel *in rem* could have been brought, the following considerations are respectfully called to the Court's attention.

1. The decision below on an important question of Suits in Admiralty Act jurisdiction is in conflict with decisions in the First, Second and Third Circuits. *Balboa Shipping Co., Inc.* v. *Standard Fruit and Steamship Co.*, 85 F. Supp. 312 (D. C. N. Y., 1949), appeal dismissed, 181 F. 2d 109; *Pennsylvania R. R. Co.* v. *United States*, D. C. S. D. N. Y. (unreported, see Appendix, pages 27a-32a); *Burkholder* v. *United States*, 56 F. Supp. 196 (D. C. E. D. Pa., 1944); *Coastwise Transportation Co.* v. *United States*, 43 F. 2d 401 (D. C. Me., 1930).

2. Moreover, jurisdiction in the Court of Claims of these charter accounting cases would permit the disposition of all issues by decision in a limited number of cases, the principles of which would be controlling in all the others because of the substantial similarity of facts and issues in all of them.

The holding that the Court of Claims is without jurisdiction must necessarily result in a vastly greater number of motions, trials, appeals, etc., in many different District

Courts and Courts of Appeals. Because the Government had asserted the lack of jurisdiction in the Court of Claims, protective libels were filed in the various District Courts. So far as counsel has been able to ascertain at this point, there are now pending either in the various District Courts or on appeal therefrom the following numbers of cases all involving similar charter accounting disputes:

Southern District of New York	16
Western District of Washington,	
Northern Division	3
Southern Division	1
District of Massachusetts	2
Eastern District of Louisiana, New Orleans Division	2
District of Delaware	2
Northern District of California, Southern Division	3

Undoubtedly there are many other cases pending.

In only one of these cases have the merits yet been decided. In that case, *Dichmann, Wright and Pugh, Inc.*, No. A. 182-397, Southern District of New York, Judge Dimock, on September 29, 1956, overruled the Government's exceptions to the libel, holding, on the merits, that section 709(a) of the Merchant Marine Act, 1936, was controlling and that the statutory profit sharing scheme prescribed therein had not been complied with by the Government. A copy of Judge Dimock's decision appears in the Appendix at pages 18a-26a.

With respect to the other cases, a multiplicity of proceedings and diversity of decisions will be inevitable. Thus, in the Second Circuit it has thus far been held that those libels filed more than two years after redelivery of the last chartered vessels were time barred, although Judge Learned

Hand dissented because he thought there was a mutual open account between the parties and that the parties had agreed to hold the account open until the Government had made a final audit of the charterer's accounting. *Sword Line, Inc.* v. *United States*, 228 F. 2d, 344, affirmed on rehearing, 230 F. 2d 75, certiorari granted only on the question of admiralty jurisdiction and affirmed, 351 U. S. 976. See also *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, affirmed, 231 F. 2d 664, certiorari denied, 351 U. S. 983; *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58. In conflict with the majority in *Sword Line*, however, in *Pacific-Atlantic Steamship Co.* v. *United States*, Judge Schweinhaut in the District of Columbia in an unreported decision (Docket No. 3404) held in a similar case that the libel was not time barred because there was a mutual open account and the date of the last item was within two years of the filing of the libel. He denied the Government's motion to dismiss the suit as time barred. The case was subsequently transferred to the Delaware District Court. Here the Government again raised the time-bar question. Chief Judge Leahy held that he was not bound by Judge Schweinhaut's decision but that, in any event, the statute of limitations question should be decided upon testimony preferably at a separate trial of that issue. 127 F. Supp. 931 (1955). Already then there are three conflicting decisions in as many Circuits on the question of statute of limitations alone.

Moreover, the question of statute of limitations, as well as the merits, raised by the Government's exceptions is now before Judge Herlands in the Southern District of New York in four cases, *Blidberg Rothchild Co., Inc.*, No. A. 188-69, *W. R. Chamberlin & Co.*, A. 184-186, and *Fall River Navigation Company*, A. 187-266, A. 187-267. And in the Northern District of California, Judge Goodman has

before him the statute of limitations question raised by Government exception in *Pacific Transport Line* v. *United States*, A. 27101. Within a short time he will also have before him the same question in *Pope & Talbot, Inc.* v. *United States*, A. 27161.

These are merely illustrative. There will be a host of additional proceedings and appeals, conflicting decisions and finally a series of petitions for certiorari in this Court to resolve the conflicts.

The fragmentation of litigation, adding substantially to the burdens of litigants and already overcrowded court dockets, is the inevitable result of divesting the Court of Claims of its long practiced jurisdiction of accounting disputes between the Government and its contractors. The splitting of the litigation into a multitude of separate, but actually duplicated proceedings, warrants review by this Court.

1. The Court below misconstrued the applicability of the decision of this Court in *Sword Line, Inc.* v. *United States*, 351 U. S. 976. That case did not involve an accounting of profits because there was a compromise in bankruptcy into which all previous obligations had been merged. 228 F. 2d, at 348; 230 F. 2d, at 75-76. In the instant cases, however, the question of accounting of profits is basic, turning upon the statutory provision for the sharing of profits.

That admiralty is without jurisdiction of an accounting of profits, even under a maritime contract, is well established. *Ward* v. *Thompson*, 22 How. 330 (1859); *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175 (1837); *Minturn* v. *Maynard*, 17 How. 477 (1855); *Vanderwater* v. *Mills*, 19 How. 82 (1856); *Grant* v. *Poillon*, 61 U. S. 162 (1858); *Duryee* v. *Elkins*, Fed. Cas. No. 4197; *Davis* v. *Child*, Fed. Cas. No. 3628.

It is of course recognized that admiralty, once it has jurisdiction, will not necessarily be divested of jurisdiction "when an accounting is necessary to the complete adjustment of rights." That was the teaching of *Hedger Transp. Corp.* v. *Bushey,* 155 F. 2d 321 (C. A. 2, 1946), certiorari denied, 329 U. S. 735. There, a mortgage had been foreclosed in admiralty. After admiralty had entered its decree the accounting issue arose. Judge Hand held, at page 323:

> * * * it has never been true, when an accounting is necessary to the complete adjustment of rights over which admiralty has independent jurisdiction, that it will suspend its remedies midway and require the parties to resort to another court.

But Judge Hand, noting the foregoing exception, also stated the general rule:

> It is true that a court of admiralty will not entertain a suit for an accounting as such * * *

In the instant cases, the accountings are not incidental, they are the bases of the suits. The question therefore is not whether the jurisdiction of admiralty is to be divested but whether there is such jurisdiction in the first instance. And as to that it is the general rule and not the exception that applies. We think Judge Ware's statement in *The Larch,* Fed. Cas. No. 8085, reversed on other grounds, Fed. Cas. No. 8086, is still the law:

> First, if the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item. Secondly, when it is not the sole object, if it is apparent from the pleadings that this is one principal object, though not the sole one, and the accounts are long and intricate and multifarious, the court will decline to take jurisdiction.

Cf. *Swift & Co.* v. *Compania Colombiana,* 339 U. S. 684, 692-693 (1950).

The assumption below, that *Sword Line,* which did not involve an accounting of profits, overturned this long established principle was unwarranted and the dismissal of the petitions, we submit, was error.

2. A further point of distinction between the instant cases and *Sword Line* is that the question of Suits in Admiralty Act jurisdiction, *absent an identifiable vessel,* was neither raised nor decided in this Court.

Section 2 of the Act provides for admiralty jurisdiction

> in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for * * *

As already pointed out, the accounting of profits here involved did not concern nor could it be related to any specific vessel. The operating results of all the vessels were merged. Losses in the operation of some vessels were offset against profits of others and the overall results were averaged into a daily profit for the group as a whole. No part of the profit, any more than the office overhead or capital employed, can be traced to any vessel. And the merger of operating results and loss of identity of the individual vessels had already taken place at the time of the commencement of the suits below. For the profits had already been paid to the Government on the basis of this merger.

It is a *sine qua non* of admiralty jurisdiction that the subject matter relate to an identifiable vessel. "Maritime causes naturally center around the ship, the great agent of maritime enterprise and affairs," 1 Benedict, *Admiralty*

(6th ed. 1940), page 123. "Transactions are 'maritime' only when in some way connected with a 'vessel'." Robinson, *Admiralty* (1939), page 42.

The jurisdictional prerequisite of an identifiable vessel is more readily seen in the cases *in rem*. See 1 Benedict, *Admiralty*, pages 22-23, and cases cited therein.

In earlier days a libel *in personam* could not be maintained where a libel *in rem* could not be. In *The Underwriter*, 119 Fed. 713 (D. C. Mass., 1902), Judge Lowell, in a distinguished and scholarly dissertation, pointed out, at page 742:

> Judge Story asserted that a libel in personam could be maintained where a libel in rem could not be. Except from his own intimation in The Jerusalem, above referred to, no court or judge, so far as is known, had ever suggested this distinction, while not a few courts had suggested that precisely the opposite distinction was maintainable.

And again at pages 743-744:

> The opinions of Mr. Justice Story have prevailed all along the line, but there is no doubt that Mr. Justice Johnson clearly established as a matter of history that in permitting a libel in personam where he denied a libel in rem the former had asserted a doctrine hitherto unknown to any law.

See concurring opinion of Justice Johnson in *Ramsay* v. *Allegre*, 12 Wheat. 611 (1827).

It follows from this that suits *in personam*, like those *in rem*, were cognizable in admiralty only if they were concerned with an identifiable vessel. And the abandonment of the principle that there was no jurisdiction of the former where jurisdiction of the latter was wanting, does not detract from the continued existence of the jurisdictional requirement that an identifiable vessel be involved.

Moreover, as is shown, *infra*, jurisdiction under the Suits in Admiralty Act, as distinguished from general admiralty jurisdiction, does not lie *in personam* unless a recovery, but for the Act, could have been had *in rem*.

In *Diefenthal* v. *Hamburg-American Line*, 46 Fed. 397 (D. C. E. D. La., 1891), a libel *in personam* was brought to recover damages for breach of a contract to purchase supplies for a group of vessels. The libel was dismissed for want of jurisdiction, the court saying, at page 399:

> It need not be held that there could not be an admiralty suit in some cases where there is no maritime lien. But where the contract is for supplies, to bring it within the admiralty jurisdiction it must come within the reason that brings material-men within the dominion of admiralty courts,—i. e., it must appear that the necessities or conveniences of ships in ports remote from home ports require that a credit should be given and a debt created which, though arising on land, are distinctively maritime, because necessary to maritime commerce as conducted by ships. *It must begin and end in the necessities of a particular vessel for her own voyage.* (Emphasis added.)

The same rule was applied where the owner of a group of vessels brought a libel *in personam* against a supplier for breach of contract to furnish fuel for groups of vessels in *Garcia* v. *Warner, Quinlan Co.*, 9 F. Supp. 1010 (D. C. S. D. N. Y., 1934), and in *Steamship Overdale Co.* v. *Turner*, 206 Fed. 339 (D. C. E. D. Pa., 1913). Libels *in rem* to recover for supplies or services furnished, but not to a specific vessel, were similarly dismissed in *The Walter Adams*, 253 Fed. 20 (C. A. 1, 1918), affirmed, 254 U. S. 1; *The Cora P. White*, 243 Fed. 246 (D. C. N. J., 1917); *The James T. Furber*, 157 Fed. 126 (D. C. Maine, 1907); *The Cimbria*, 156 Fed. 378 (D. C. Mass., 1907).

Consequently, if the vessels had been privately owned a proceeding in admiralty could not have been maintained for the relief sought below. Suits in Admiralty Act jurisdiction is thus wanting for two reasons: (1) because there is no general admiralty jurisdiction since the accounting here involved does not relate, and cannot be related, to any specific vessel; and (2) because there is no jurisdiction under the Act where there could not have been a libel *in rem.*

Balboa Shipping Co., Inc. v. *Standard Fruit and Steamship Co.*, 85 F. Supp. 312 (D. C. N. Y., 1949), appeal dismissed, 181 F. 2d 109, held that reference to a specific vessel is a prerequisite to jurisdiction under that Act:

> Neither §742 nor §781 of Title 46 reads like a general consent on the part of the United States to be sued. The Suits in Admiralty Act is limited to cases where a proceeding in admiralty could be maintained "if *such* vessel were privately owned or operated, or if *such* cargo were privately owned and possessed." §742 The Public Vessels Act is limited to claims "for damages caused by a public vessel". §781.
>
> It strains the language and I think it also strains the purpose of the statutes to read them, as libellant would read them, as authorizing suit against the United States without reference to a specific vessel. See Ryan Stevedoring Co., Inc. *v.* United States, 2 Cir., 1949, 175 F. 2d 490 (pp. 312-313, italics the court's.)

In *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, this Court held that the Suits in Admiralty Act was applicable to a case where a suit *in rem* would have lain had the offending vessel survived. In that case libels were brought to recover the value of goods carried on a merchant vessel owned by the United States. It was alleged that the vessel

had deviated from the agreed voyage and by reason thereof had stranded and become a total loss with all her cargo. It was held that jurisdiction lay under the Suits in Admiralty Act. This Court said at page 212:

> In *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 689-692 (1927), we held that, while the main purpose of the Act was to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations and to substitute for a suit *in rem* one *in personam* attended with the incidents of a proceeding *in rem* in which the personal liability of the United States took the place of the vessel, the Act also had a wider effect and created a broader personal obligation of the United States, *as the owner of an offending vessel,* like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.* (Emphasis added.)

Had the vessel survived, a libel *in rem* would have been an appropriate remedy. But where, as in the instant cases, libels *in rem* could not have been brought because there was no specific vessel to which the accounting of profits here sought could be related, the Suits in Admiralty Act is not applicable.

Set out in the Appendix herein at pages 27a-32a, is an unreported opinion dated May 7, 1956, by Judge Ryan in *Pennsylvania R. R. Co.* v. *United States,* Southern District of New York, Civil No. 72-294. There plaintiff sued under the Tucker Act for damage sustained by its barge while it was in the possession of the United States. Defendant asserted that the suit was maintainable exclusively under the Suits in Admiralty Act and was time barred. Both

sides moved for summary judgment. Holding that the plaintiff was entitled to judgment, Judge Ryan said:

> The significant difference between the *Eastern Transport* and *Rosenberg* cases and the instant case is that there the claims pleaded were predicated on an in rem liability which would have subjected the vessels to seizure had they been in existence and privately owned, and permitted a recovery in rem, whereas here the claim pleads a purely personal liability which at no time could have permitted a remedy or recovery in rem. This distinction was recognized by Judge Kirkpatrick in *Burkholder* v. *United States*, 56 F. Supp. 106 (E. D. Penn. 1944) and by Judge Dimock in the memorandum filed in this case on June 14, 1955. *Prudential S. S. Company, Matson Navigation Co., supra,* and *Aliotti* v. *United States* (C. A. 9, 1955), 221 F. 2d 589 are not to the contrary, for in each of those cases the vessel or cargo in question could have been libeled.
>
> Thus, it is essential to the filing of a libel under the Suits in Admiralty Act that the claim be of a nature enforcible by a proceeding in rem. No libel in rem could ever have been filed here; the court would have been without jurisdiction under the statute; plaintiff's only available remedy lay at law under the Tucker Act upon a contract (C. F. Harms Co. *v.* Erie R. R., 167 F. 2d 562, CA 2, '48); the suit was timely filed and judgment is awarded the plaintiff. Submit decree.

See also *Coastwise Transportation Co.* v. *United States*, 43 F. 2d 401 (D. C. Me., 1930).

The fact that the instant suits are concerned with an accounting of profits, after all the chartered vessels had been redelivered, and thus are not capable of relation to any specific vessel which, in any circumstances, could have been libelled *in rem*, places the suits beyond the reach of

admiralty and renders the Suits in Admiralty Act inapplicable. The court below erroneously considered itself divested of its long standing jurisdiction of such suits.

Conclusion

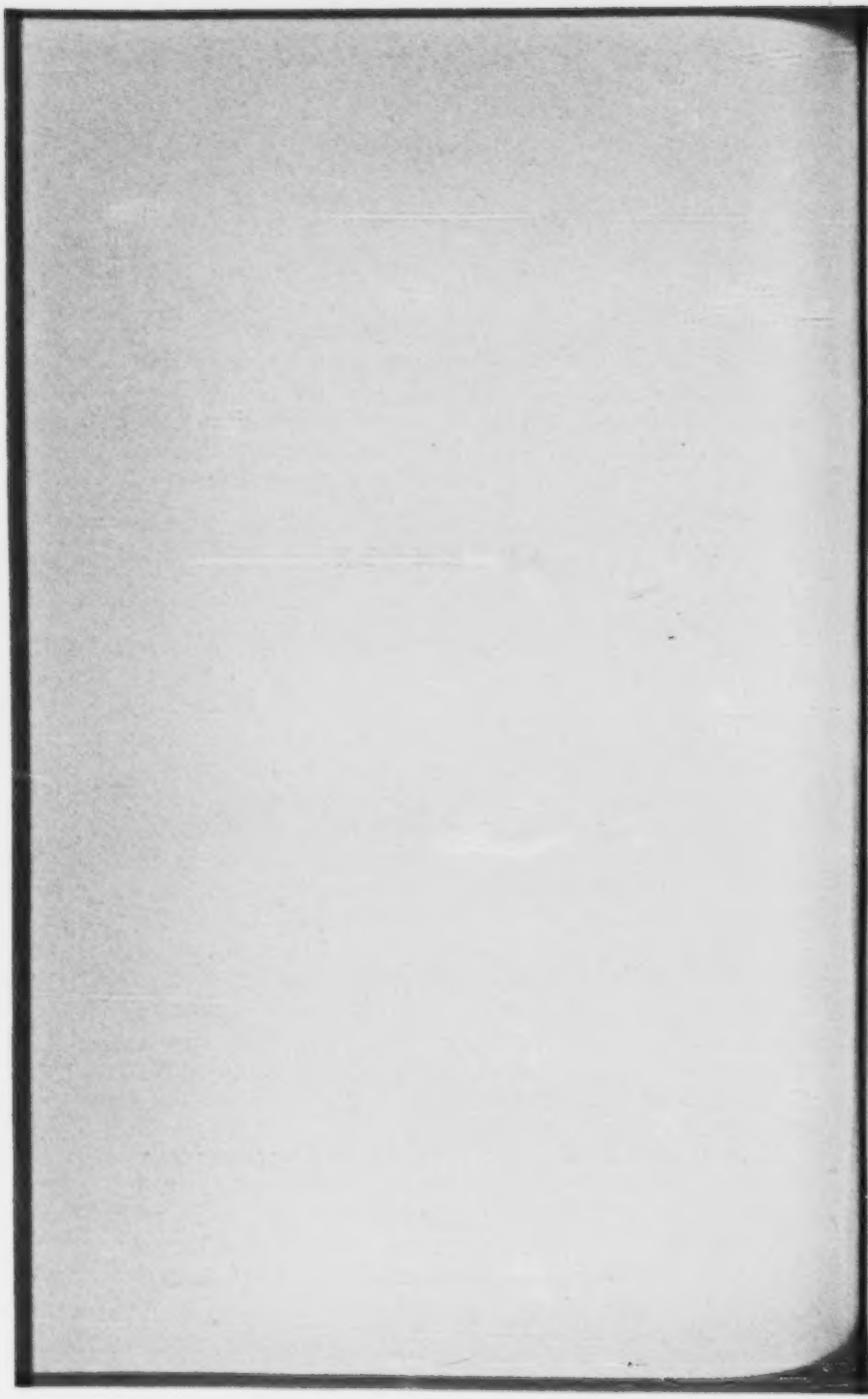
The writs should therefore be granted.

Respectfully submitted,

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October 10, 1956.



APPENDIX

Statutes Involved

28 U. S. C. 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

ACT OF MARCH 9, 1920

41 Stat. 525, 46 U. S. C. 741, 742

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against

the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

MERCHANT SHIP SALES ACT OF 1946

60 Stat. 43, 50 U. S. C. App. 1738

CHARTER OF WAR-BUILT VESSELS TO CITIZENS

SEC. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having pasenger accommoda-

tions for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

(d) Where an operator is engaged both in the foreign trade and in the domestic trade (coastwise or intercoastal), additional charter hire determined with reference to voyage profits of the chartered vessels, under regulations promulgated by the Maritime Commission, shall be computed, accounted for, and paid separately on such foreign trade and shall be computed, accounted for, and paid separately on such domestic trade, covering all voyages commencing subsequent to June 30, 1947.[1]

MERCHANT MARINE ACT, 1936

49 Stat. 2010, 46 U. S. C. 1199

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such

[1] Subsection (d) was added by the Act of June 28, 1947, 61 Stat. 190.

chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided,* That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

(b) Every charter shall contain a definition of the terms "net voyage profit" and "fair and reasonable overhead expenses", and "capital necessarily employed", as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expense and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter.

Orders and Opinions Below

IN THE

UNITED STATES COURT OF CLAIMS

242-55 MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC.

262-55 PACIFIC FAR EAST LINE, INC.

314-55 BLACK DIAMOND STEAMSHIP CORP.

v.

THE UNITED STATES

Order

It appearing to the court that on June 11, 1956, the Supreme Court in the case of *Sword Line, Inc.* v. *United States,* No. 861, October 1955 Term, decided that causes of action of the nature stated in the petitions in these cases were of a maritime nature and, hence, that the courts of admiralty had juridsiction thereof,

IT IS ORDERED this twelfth day of July, 1956, that the former decisions rendered on March 6, 1956, which overruled defendant's motions to dismiss or for summary judgment are set aside and the petitions are now dismissed for the lack of jurisdiction, all as more fully set forth in the opinion rendered this day in the case of *Smith-Johnson Steamship Corp.* v. *United States,* No. 98-55.

By the Court,

BENJAMIN H. LITTLETON,
Acting Chief Judge.

Orders and Opinions Below

IN THE UNITED STATES COURT OF CLAIMS

No. 98-55

(Decided July 12, 1956)

SMITH-JOHNSON STEAMSHIP CORP.

v.

THE UNITED STATES

Mr. ARTHUR M. BECKER for plaintiff. Messrs. MELVIN SPAETH, GERALD B. GREENWALD and BECKER & MAGUIRE were on the brief.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General GEORGE COCHRAN DOUB, for defendant.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

PER CURIAM: In our opinion in this case rendered March 6, 1956, which was before us at that time on plaintiff's motion to strike defendant's special defense, we granted that motion, holding that plaintiff's petition was based on a statute and did not arise out of the maritime contract between the United States and plaintiff. Hence, we said the courts of admiralty did not have jurisdiction of such a case and that this court did.

The Second Circuit Court of Appeals had held in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, that the suit was on the contract, and since the contract was for the charter of a ship, it was maritime in nature, and, therefore, the

admiralty courts had jurisdiction. Certiorari was granted in that case, and the Second Circuit was affirmed by the Supreme Court in a *per curiam* opinion, which reads:

> *Per curiam:* Certiorari is granted limited to the question whether admiralty had jurisdiction over the controversy stated in the libel and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti,* 350 U. S. 532. Affirmed.

Since it is now settled that such causes of action are maritime causes of action and that, consequently, courts of admiralty have jurisdiction of them, this court does not have jurisdiction, because it is settled that the Suits in Admiralty Act, vesting jurisdiction in the district courts, "furnishes the exclusive remedy in admiralty against the United States and such corporations on maritime causes of action arising out of the possession and operation of merchant vessels." *Johnson* v. *Fleet Corp.*, 280 U. S. 320.

Plaintiff, Smith-Johnson Steamship Corporation, in its memorandum brief filed pursuant to the Court's order of June 14, 1956, says this case was overruled by the Supreme Court in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 578.

In the opinion in *Johnson* v. *Fleet Corporation, supra,* the court dealt with four cases, of which *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten* was one. In the *Lustgarten* case, an action at law for damages for personal injuries was brought in the United States District Court against the Fleet Corporation and the Navigation Company. The Navigation Company was a private corporation operating a vessel owned by the United States as the agent of the United States. Defendant's answer alleged that "plaintiff's remedy is provided exclusively by the Suits in Admiralty Act," and, since his

action was brought on the law side of the court, rather than the admiralty side, the suit should be dismissed.

The Supreme Court held that courts of admiralty had exclusive jurisdiction and, hence, it remanded the case with directions to the District Court to dismiss it.

In *Brady* v. *Roosevelt Steamship Company, supra,* the Supreme Court said it was erroneous to have dismissed the case as against the private company operating the ship as agent for the United States; but it reaffirmed its former action in dismissing it as to the *Fleet Corporation.* It said:

> There is ample support for the holding in the *Johnson* case that section 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. • • •

Therefore, instead of impairing the authority of *Johnson* v. *Fleet Corporation, supra,* so far as the question now before us is concerned, *Brady* v. *Roosevelt Steamship Co., supra,* upholds it and reaffirms the exclusive jurisdiction of courts of admiralty "for the enforcement of maritime causes of action covered by the Act."

In *Sword Line, Inc.* v. *United States, supra,* the Supreme Court has said this action was a maritime one and was covered by the Act. Hence, we have no alternative other than to deny plaintiff's motion for summary judgment and to grant defendant's motion to dismiss plaintiff's petition for lack of jurisdiction.

It is so ordered.

Earlier Orders and Opinions Below

March 6, 1956

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1956)

No. 98-55

SMITH-JOHNSON STEAMSHIP CORP., v. THE UNITED STATES

No. 262-55

PACIFIC FAR EAST LINE, INC., v. THE UNITED STATES

No. 314-55

BLACK DIAMOND STEAMSHIP CORP., v. THE UNITED STATES

Mr. ARTHUR M. BECKER for plaintiff in case No. 98-55; Messrs. MELVIN SPAETH, GERALD B. GREENWALD, and BECKER & MAGUIRE were on the briefs. Mr. J. FRANKLIN FORT for plaintiff in case No. 262-55; Messrs. RADNER, ZITO, KOMINERS & FORT, and ISRAEL CONVISSER were on the briefs. Mr. GEORGE F. GALLAND for plaintiff in case No. 314-55; Messrs. WILLIAM J. LIPPMAN, ROBERT N. KHARASCH, and GALLAND & KHARASCH were on the briefs.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General WARREN E. BURGER, for defendant.

ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SPECIAL DEFENSE IN CASE NO. 98-55, AND ON DEFENDANT'S MOTIONS TO DISMISS IN CASES NOS. 262-55 AND 314-55.

Earlier Orders and Opinions Below

OPINION

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff alleges in the *Smith-Johnson Steamship Corporation* case that the defendant exacted from it for the hire of certain vessels more than was authorized by the Merchant Ship Sales Act of 1946 (60 Stat. 41), 50 U. S. C. App. 1735, et seq., and the Merchant Marine Act of 1936 (49 Stat. 1985), 46 U. S. C. 1101, et seq. It sues for the excess. Defendant in its answer sets up the special defense that this court lacks jurisdiction of the subject matter, because, it says, plaintiff's cause of action is on the contract for the hire of the vessels and is, therefore, maritime in nature, of which actions the admiralty courts have exclusive jurisdiction. Plaintiff says its action is on the statute and it moves to strike defendant's special defense.

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels. Section 5 (b) authorized the United States Maritime Commission to fix the charter hire for vessels at such rates as the Commission should determine to be consistent with the policy of the Act. Plaintiff says that, in fixing the charter hire for the vessels chartered to it, the Commission went contrary to the policy of the Act in that it exacted from it a stated hire and in addition percentages of its profits on the voyages of the vessels in excess of the percentages authorized by the Act.

Section 5 (c) of the Act incorporated section 709 (a) of the Merchant Marine Act of 1936 (49 Stat. 1985, 2010) which provided:

> Every charter made by the Commission * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed

10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter agreement tendered plaintiff by the Maritime Commission provided for a basic charter hire and also for additional charter hire as follows:

Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of the vessels (all as hereinafter defined), the charterer shall pay over to the owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of

$100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 "WARSHIPDEMISEOUT" charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Plaintiff says this charter agreement exacted a percentage of its profits in excess of that authorized by law. Nevertheless, the charter agreement was executed and eight vessels were delivered to plaintiff. While the charter agreement was in effect plaintiff made preliminary payments of additional charter hire to defendant, pursuant to clause 13 of the agreement, quoted above, totalling the sum of $613,395.32. By final audit completed on February 4, 1955, defendant determined that, at the time of the audit, a total of $616,063.04 had accrued to defendant as additional charter hire under the charter agreement, which was paid on demand. Plaintiff seeks to recover $231,773.81 of the amount paid defendant as additional charter hire, on the ground that the contract exacted this much more than was authorized by law.

The issue presented is whether plaintiff's claim is on the contract, and, therefore, maritime in nature, of which the district courts have exclusive jurisdiction, or is a claim based on the statute, of which this court is given jurisdiction by section 1491 of Title 28 U. S. C.

Defendant says the action is maritime under both the Public Vessels Act and the Suits in Admiralty Act. The Public Vessels Act is not applicable because the vessels involved herein are not public vessels; only the Suits in Admiralty Act is pertinent. This Act confers exclusive jurisdiction on the district courts only in situations where, if the vessels were privately owned, a proceeding in admiralty could be maintained. *D. C. Andrews & Co.*, v. *United States*, 129 C. Cls. 574. If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law authorized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction.

Defendant relies upon *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, but in this case, plaintiff's claim was based on the contract, and not on the ground that the contract had exacted more than the law allowed. Plaintiff alleged that it had paid more for the carriage of freight than was due under the contract and sought to recover the amount of the overpayment. Admiralty had jurisdiction because the suit was on a maritime contract. The case is not in point on the question before us.

In *Archawski* v. *Hanioti*, 223 F. 2d 406, the Court of Appeals for the Second Circuit said that an action by prospective passengers to recover money paid for passage on a vessel that never sailed was a common law action of

indebitatus assumpsit, of which the admiralty courts had no jurisdiction. The Supreme Court granted certiorari, and it may be it will hold that the action was for a breach of a maritime contract, of which the admiralty courts have jurisdiction; but, even so, such a decision could not affect the decision of this case, since we think this is a suit based not on a contract, either maritime or at common law, but on a statute.

The Second Circuit, in an opinion by a pre-eminent jurist, decided *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, in which it took a view contrary to what we have expressed. It said in effect that the parties are presumed to have agreed on a hire for the vessels no greater than the law allowed and, hence, that the suit for excessive exaction was a suit on the contract, of which the courts of admiralty have jurisdiction. But no such presumption can be indulged in the case at bar, because it is contrary to the facts. The parties in fact did agree on a hire greater than the law allowed—taking the allegations of the petition to be true.

If the Government is not entitled to retain the excess, it is not because plaintiff did not agree to pay it, but because the statute did not authorize the exaction of so much. If plaintiff is entitled to recover, it is because its rights under the statute have been violated, not its rights under the contract.

For the reasons stated, we conclude that the plaintiff's cause of action is non-maritime in nature, and is one which could not be maintained in a court of admiralty. Accordingly, the claim falls within the jurisdiction of this court, and plaintiff's motion to strike defendant's special defense of want of jurisdiction is granted.

Defendant, in cases Nos. 262-55 and 314-55, has moved the court to dismiss for lack of jurisdiction. Relative to the question of jurisdiction, the causes of action asserted in the petitions of the respective plaintiffs in these cases are identical to the cause of action asserted in *Smith-Johnson Steamship Corporation* v. *United States*, No. 98-55. For

reasons stated above, we hold that this court has jurisdiction over the subject matter of these causes of action. Therefore, defendant's motions to dismiss for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

IN THE UNITED STATES COURT OF CLAIMS

No. 242-55

(Decided March 6, 1956)

MARINE TRANSPORT LINES, INC., AND MARINE NAVIGATION COMPANY, INC., v. THE UNITED STATES

Mr. J. FRANKLIN FORT for plaintiffs. Messrs. RADNER, ZITO, KOMINERS & FORT and ISRAEL CONVISSER were on the brief.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General WARREN E. BURGER, for defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

OPINION

WHITAKER, Judge, delivered the opinion of the court:

This case involves claims arising out of the lease of certain vessels by the defendant to plaintiffs under the Merchant Ship Sales Act of 1946, 60 Stat. 41; 50 U. S. C. A.

App. 1735 *et seq.* The case is before the court on defendant's motion for summary judgment, based on lack of jurisdiction in this court.

Plaintiffs' petition asserts four causes of action. The first of these is identical with the cause of action asserted in the case of *Smith-Johnson Steamship Corp.* v. *The United States,* No. 98-55, *et al.,* this day decided. For reasons therein stated it is our opinion that this court has jurisdiction over the subject matter of plaintiffs' first cause of action.

Plaintiffs' second count alleges that there were latent defects in many of the vessels delivered to them by the defendant and that these defects caused plaintiffs to be put to the expense of making repairs. It further asserts that the Maritime Commission ruled that these expenses were chargeable to the voyage accounts as routine operating expenses, whereas, under the Commission's own regulations the full amount of the expenses should have been refunded or credited to them, and not charged as a part of the voyage expenses in determining the profits from the voyage.

Plaintiffs' third count alleges that the Commission, contrary to its own regulations, did not allow plaintiffs full credit for consumable stores aboard the vessels at the time of redelivery, because it used a price list based on prices as of 1946 or earlier, whereas the regulations provided that the pricing should be computed as of the date of redelivery, at which time prices were higher than in 1946.

Plaintiffs' fourth and final count is a claim for expenses allegedly incurred in maintaining one of the vessels between the time plaintiffs sought to redeliver it and the time the Commission accepted redelivery, contrary to an earlier understanding between the parties that redelivery would be accepted when offered.

Plaintiffs contend that since their second and third causes of action are founded upon a regulation of an executive department, they are non-maritime in nature and thus within the jurisdiction of this court. The fourth cause

of action is based solely upon the defendants alleged violation of an understanding between the parties that it would accept redelivery of a certain one of the vessels when offered.

Defendant says that all of plaintiffs' claims are maritime in nature and thus beyond the jurisdiction of this court. It says that at least a part of them are based upon the contract and are thus maritime in nature.

It is unnecessary to decide whether or not the last three causes of action are maritime in nature, because they are clearly subsidiary to the main cause of action, stated in the first count of the petition, over which we have held we have jurisdiction. The second, third and fourth counts are so interrelated with the principal cause of action that as a practical matter the court taking jurisdiction of the first cause of action must necessarily decide the other three. If it is held that plaintiffs are entitled to recover on the first count, the amount due them cannot be determined without considering the other counts.

To illustrate: Plaintiffs are due to pay defendant a certain percentage of their profits on the voyages above 10 per cent of their invested capital. We must therefore, determine what those profits were. In doing so, it would be necessary to decide whether or not the cost of making repairs should be a deduction from the gross profit. This is the basis of plaintiffs' second cause of action. So, with the consumable stores and standby expenses incurred before the defendant accepted redelivery.

All four causes of action arise out of the same transaction, and, hence, the court taking jurisdiction of the main cause of action should decide them all.

For the reasons stated, it is our conclusion that this court has jurisdiction over the subject matter of all the counts set out in plaintiffs' petition. Therefore, defendant's motion for summary judgment for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

#382

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DICHMAN, WRIGHT & PUGH, INC.
Libelant

against

UNITED STATES OF AMERICA
Respondent

A. 182-397

Appearances:

HILL, BETTS & NASH, Esqs.,
120 Broadway
New York 38, New York

KOMINERS & FORT, Esqs.,
529 Tower Building
Washington 5, D. C.
Proctors for Libelant

J. FRANKLIN FORT, Esq.,
EDWIN LONGCOPE, Esq.,
JOHN CUNNINGHAM, Esq.,
ISRAEL CONVISSER, Esq.,
Of Counsel.

Honorable PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Foley Square, New York 7, N. Y.

LEAVENWORTH COLBY, Esq.,
Chief, Admiralty & Shipping Section
Department of Justice,

BENJAMIN H. BERMAN, Esq.,
Attorney in Charge, New York Office
Admiralty & Shipping Section
Department of Justice.
Of Counsel.

Opinion.

DIMOCK, D. J.

This is a suit in admiralty to recover amounts of charter hire which libelant claims to have overpaid. Three "causes of action" are set forth in the libel but the first and third have been held to be time barred. Respondent, United States, the shipowner, excepts to the second on the ground of insufficiency.

Libelant seeks to recover amounts paid, under a sliding scale of "additional charter hire" set forth in the charter party, insofar as they exceed 50% of so much of its profits as exceed 10% on the capital employed in the operation of the ships. It cites in support of its claim section 709(a) of the Merchant Marine Act of 1936, as amended, 49 Stat. 1985, 46 U. S. 1101 et seq., which is copied in the margin.[1]

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[1] "Sec. 709 (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

The sliding scale in the charter party, in clause 13, copied in the margin,[2] begins by providing for payment to respondent of 50% of the profits over 10%, just as does section 709(a), but the charter party maintains that rate only so long as the profits do not exceed $100 per day. Insofar as they do exceed $100 per day, and do not exceed $300 per day, the charter party, unlike section 709(a), goes on to

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[2] "CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1950, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentage of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

provide for payment of 75% and, insofar as they exceed $300 per day, 90%.

Libelant contends that the 50% rate fixed by section 709(a) is a limitation. Respondent contends that it is a mere minimum. For the reasons hereinafter stated, I hold that it is a limitation and that libelant is entitled to the return of the excess paid on the face of the libel.

Section 709(a), by its terms, contemplates two types of payment to the shipowner: "the charter hire reserved in the charter" and "additional charter hire". The "additional charter hire" is 50% of so much of the profits "(after payment of the charter hire reserved in the charter * * *)" as exceeds 10% on the capital employed. Thus the "charter hire reserved in the charter" is a factor in the computation of the "additional charter hire".

The obvious purpose of the statutory requirement that charters shall contain a provision for the payment of this "additional charter hire" is to cut down the excessive profits payable in case the "charter hire reserved in the charter" has been fixed too low.

At the time of the adoption of section 709(a), it was clear that the share of the excess profits destined for the owner was 50% and that the Commission was powerless to raise or lower that share. By section 706(a) of the Act it was provided that the Commission should not "charter its vessels to private operators except upon competitive sealed bids" and section 707(a) contained the direction that the "Commission shall award the charter to the bidder proposing to pay the highest monthly charter hire". When the critical section 709(a) referred to "the charter hire reserved in the charter" it must have meant this "monthly charter hire" which constituted the basis of the bids. Thus the requirement in that section that the charter should contain a provision for "additional charter hire" of 50% of the excess profits was for the purpose of giving the owner a share of the windfall if the bid should prove to have been too low. In order to bid intelligently

the bidders had to know in advance what percentage of the total excess profits this share would be. The statute said 50%. Certainly the Commission by its fiat could not say "Bids will be on the assumption that the rate of recapture will be 75%" and even less could it, after a bid had been accepted, say "Your bid was on the assumption that the rate of recapture would be 50% but the charter party is going to provide that it will be 75%".

Since, therefore, section 709(a) at the time when it was adopted did not admit of any recapture rate in excess of 50%, the owner's position must be that its meaning was changed for the purposes of its application to the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. App. 1735 et seq.

Section 5(c) of that act made applicable to charters thereunder the critical section 709(a) of the Merchant Marine Act of 1936, copied in note 1 supra. The new act, in section 5(b) copied in the margin,[3] abandoned competitive bidding as a basis for fixing charter hire and provided that the charter hire must be fixed "at such rate as the Commission determines to be consistent with the policies of this Act". This section places two bottom limits on the Commission's scope, however. The rate shall not be less than 15% of the statutory sales price except upon the affirmative vote of at least four members of the Commission and, even then, shall not be less than the prevailing world market charter rates, except in the case of large passenger ships.

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[3] "Sec. 5(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.

Congress was not satisfied with the restrictions that the charter hire must be at a rate determined to be "consistent with the policies of this Act" and must not be less than 15% of the sales price in the absence of the affirmative vote of four commissioners and even then must not be less than the world market rate. It made applicable the old provision in section 709(a) of the Merchant Marine Act of 1936 so that, in the event of a windfall due to the generous determination or a change in traffic conditions, the charterer must share the excessive profits with the owner. According to the words of the statute the charterer and the owner are to share these excess profits fifty-fifty. In spite of the express direction: "[e]very charter * * * shall provide that * * * the charterer shall pay over * * * one-half" of such profit, and contrary to the clear intent of the statute when originally enacted, the respondent says that the charter need only provide that the charterer shall pay over an expressed fraction of such excess profit at least as large as one-half.

To substantiate such an expansion of the literal meaning of the statute and of its original intent, the owner invokes the power given to the Commission by section 5(b) to fix the charter hire rate. That power, however, was exhausted when the amount of the charter hire was fixed. That amount was fixed in dollars "at such rate as the Commission determines to be consistent with the policies of this Act." To say that the power to fix the charter hire carries over to the fixing of the rate of division of the excess profits under 709(a) would be to render the statutory scheme for two items of charter hire meaningless. The effect of the rule contended for by the owner is that the Commission could fix the rate of the owner's share of the excess profits at any figure not less than 50% so long as the net result would be that the sum of the "charter hire reserved in the charter" and the "additional charter hire" would produce "such rate as the Commission determines to be consistent with the policies of this Act". If the entire amount pay-

able under the charter party were indeed to be nothing but charter hire "at such rate as the Commission determines to be consistent with the policies of this Act", no intelligible purpose could be assigned to a statutory requirement that this amount be expressed in the charter party as the sum of an arbitrarily fixed "charter hire reserved in the charter" and an "additional charter hire" developed from the "charter hire reserved in the charter" among other factors.

The owner's contention is that the power to increase the owner's share of the excess profits above 50% in fixing the "additional charter hire" is necessary in order to make sure that the sum of the "charter hire reserved in the charter" and the "additional charter hire" shall equal "such rate as the Commission determines to be consistent with the policies of this Act". Since, under a correct interpretation of section 709(a), the "additional charter hire" forms no part of the rate determined by the Commission to be consistent with the policies of the Act, this argument for the power to fix the owner's share at more than 50% falls. Section 709(a) is clear in fixing it at 50% so I conclude that that share is a maximum as well as a minimum.

I see no reason why the Commission should not fix charter hire "at such rate as the Commission determines to be consistent with the policies of this Act" by inserting in the charter party a flat rate clause and a clause providing for payment on a sliding scale based on more than 50% of the excess profits. In doing so it would be fixing the "charter hire reserved in the charter" and it would be required by section 709(a) to insert in the charter another profit sharing clause in the statutory form to provide that any excess profits produced by the flat rate clause and the sliding scale clause would be "additional charter hire" and divided fifty-fifty. There is no allegation that that was done here, however.

It is asserted that Congress knew of the practice of computing charter hire on a sliding scale of profits. Be

that as it may, it is not asserted that Congress knew that a sliding scale clause was being used as a substitute for the 50% division clause required by section 709(a).

It is said that a charterer cannot be heard to complain that the owner has omitted a clause which would have required the charterer to pay additional charter hire. That might be true if it appeared that the Commission had formally determined that the sum of the two rates fixed by the flat rate clause and the sliding scale clause in the charter was the rate consistent with the policies of the Act and had inadvertently omitted the profit sharing clause required by section 709(a). Again, however, there is no allegation that that was done here. On the face of the libel I must assume that the owner intended to comply with the law and that the sliding scale profit sharing clause was inserted in attempted compliance with section 709(a). Indeed the owner says in its brief "The Commission's draftsmen in Clause 13 of the charter merely merged the mandatory 50 percent minimum of profit sharing into a discretionary sliding scale of profits, which the Commission had fixed under Section 5(b)".

The argument that libelant, having signed a charter party fixing the owner's share at more than the lawful 50%, cannot recover the excess has been answered in this Circuit in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, 346, aff'd 350 U. S. 532. There Judge Learned Hand said, p. 346:

> "The claim has for its premise that § 709 of the Merchant Marine Act of 1936 made illegal that portion of 'clause 13' of the charter that stipulated for the graduated scale of profit-sharing instead of for a division half and half, regardless of amount. It might be argued, if the libellant is right about § 709, that no contract was ever made, because the section made the libellant's promise unenforceable and there were therefore no mutual promises. On the other

> hand, if the statute did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire."

The exception to the second "cause of action" is overruled.

Dated: September 29, 1956.

/s/ EDWARD J. DIMOCK,
United States District Judge.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

Civil No. 72-294

Appearances:

BURLINGHAM, HUPPER & KENNEDY, Attorneys for plaintiff, HERBERT M. LORD, of counsel.

PAUL W. WILLIAMS, U. S. Attorney, Attorney for defendant, BENJAMIN H. BERMAN, Attorney Dept. of Justice, of counsel.

RYAN, J.

In this suit at law plaintiff and defendant have moved for summary judgment; all material facts have been stipulated.

Plaintiff seeks recovery of $1839. damage to its barge sustained between March 3 and 7, 1947 and alleges jurisdiction under the Tucker Act (§1346(a)(2), 28 USCA). Defendant contends that plaintiff had available to it a remedy under the Suits in Admiralty Act (§741 et seq. 46 USCA) only and that the suit when filed on January 16, 1952 was time barred by the two-year limitation of the Act. If plaintiff may maintain this suit under the Tucker Act, the complaint is timely filed under the six-year limitation of that statute.

We must determine whether this court would have had jurisdiction under the Suits in Admiralty Act to entertain this claim had it been filed within the statutory period. If it would have, its jurisdiction under the Act was exclusive and the complaint must be dismissed as not timely brought. *Johnson* v. *Fleet Corporation*, 280 U. S. 320 (1930); *Prudential S.S. Corp.* v. *United States*, 220 F. 2d 655 (C. A. 2, 1955).

Plaintiff owner of the barge delivered it on March 3, 1947 to defendant with defendant's cargo aboard; upon redelivery of the barge after the cargo had been unloaded the barge was found to be in a damaged condition. Plaintiff repaired it and now, almost five years later, seeks to recover the damages it sustained as a result of the breach on the part of defendant of the contract of bailment. It is alleged that the damage to the barge occurred while it was in defendant's possession as bailee. No claim is made against the United States as owner of offending cargo and none against the vessel so that neither the cargo nor the vessel under the pleadings would have been under general maritime law subject to arrest. It is conceded by defendant that although the claim asserted arose from a maritime contract it did not give rise to a maritime lien, so as to support the filing of a libel in rem, but only to a direct, personal liability on the part of defendant.

The question then is: did the Suits in Admiralty Act, absent a liability enforceable by a libel in rem under general maritime law, intend to encompass a purely in personam liability and thereby provide the sole remedy in a case such as this?

Defendant urges that this question has been answered in the affirmative by *Johnson* v. *Fleet Corp., supra; Matson Navigation Co.* v. *United States*, 284 U. S. 352 and *Prudential Steamship Corp.* v. *United States, supra.*

By Section 1 of the Act vessels or cargo owned or possessed by the United States are immune from arrest and seizure in view of the provision of Section 2 which

permits the filing of a libel in personam against the United States in cases where if such vessel were privately owned or operated a proceeding in admiralty could be maintained.

Enactment of the Act followed the decision in the *Lake Monroe,* 250 U. S. 246 (1919), which held that under the Shipping Act of 1916 Government owned vessels while engaged in commercial activity were subject to seizure as if they were privately owned.

The purpose of the statute was to avoid the embarrassment of having Government vessels arrested and seized and of having its commercial operations interfered with (*Blamberg* v. *United States* (1923), 260 U. S. 452) and in lieu thereof to provide a remedy by a libel in personam and "a balancing consideration" for the immunity of the Government vessels and cargo from seizure under a libel in rem. *Prudential S. S. Corp.* v. *U. S., supra; Eastern Transport Co.* v. *United States,* 272 U. S. 675 (1927). In keeping with this purpose it is necessary to read the grant of waiver of immunity of Section 2 as coextensive with the immunity given by Section 1 and as compensation for such immunity and prohibition. *Calmar S. S. Corp.* v. *United States* (1953), 345 U. S. 446, 453 n. 6. That Section 2 is in pari materia with and subject to the limitations of Section 1 was made clear by the holding in *Blamberg* v. *United States, supra.* There in an action in which there was no personal liability alleged a libel in personam under the statute had been filed against the United States as owner of a vessel located in a foreign port. The Court dismissed the libel and held (1) that the Suits in Admiralty Act did not apply to vessels outside the United States, (2) that therefore the vessel obtained no immunity under Section 1 which had to be compensated for by a libel in personam under Section 2, and (3) that absent such immunity from seizure, the Act did not intend to grant an in personam jurisdiction where none otherwise existed. By the Court's decision the right to sue the United States in personam

under the statute was limited to those cases where a claim enforceable in rem existed which was taken away by the first section; however, where such right was present but was not taken away no grant of in personam jurisdiction was to be read into Section 2. See also, *Shewan* v. *United States*, 266 U. S. 108 (1924); *Nahmeh* v. *United*, 267 U. S. 122 (1925).

In 1927 the Supreme Court had occasion to define the scope of the jurisdiction granted by the second section of the Act. In *Eastern Transport Co.* v. *United States, supra*, a libel in personam against the United States as owner of a sunken wreck which had caused a collision and damage to plaintiff's vessel was filed. The claim sought to be enforced was one which would have given rise to a maritime lien and which would have been prosecuted by a proceeding in rem had the wrecked vessel survived. Since however there was no res upon which a recovery could be based, the libelant was obliged to rest upon the personal liability of the Government as owner and to prosecute his claim "in principle in personam as distinguished from an action in rem against the vessel wrecked." This the Court held he could do under the Act. It held that the phrase "a proceeding in admiralty" was broad enough to cover both a libel in personam and a libel in rem and that by reason of Section 3 the proceeding was not limited in its scope, purpose and incidents to that of "a suit in rem merely transmuted into the form of an action in personam." The Court further wrote:

> "In spite of the purpose of the Act to create a substitute for a suit *in rem*, however, we are forced to the view by the language used in §§3 and 6 that it must be construed to have a wider effect than that which its §1 would lead us to expect" (p. 689).

Section 3, it found, provided in a proper case a double remedy against the United States—a remedy really in

personam as the owner of the offending vessel, like any private owner, and a remedy in substance in rem against the vessel, but which under the Act took the form of a proceeding in personam and substituted the personal liability of the Government for that of the vessel which was declared immune.

In *Fleet Corp.* v. *Rosenberg Bros.* (1924), 276 U. S. 202, decided the following year, this holding was reaffirmed. There a libel in personam was filed against the Government as owner of a vessel which had stranded and become a total loss resulting in the destruction of libelant's goods. Again the claim was one in which a recovery in rem might have been had except for the fact that the res had not survived. For the first time, too, the Court held that the Act under such circumstances provided the exclusive remedy in admiralty—although it refrained from passing on the availability of concurrent remedies in a court of law. In a later case, *Johnson* v. *Fleet, supra* (1930), the Court concluded "that the remedies given by the Act are exclusive in all cases where a libel might be filed under it."

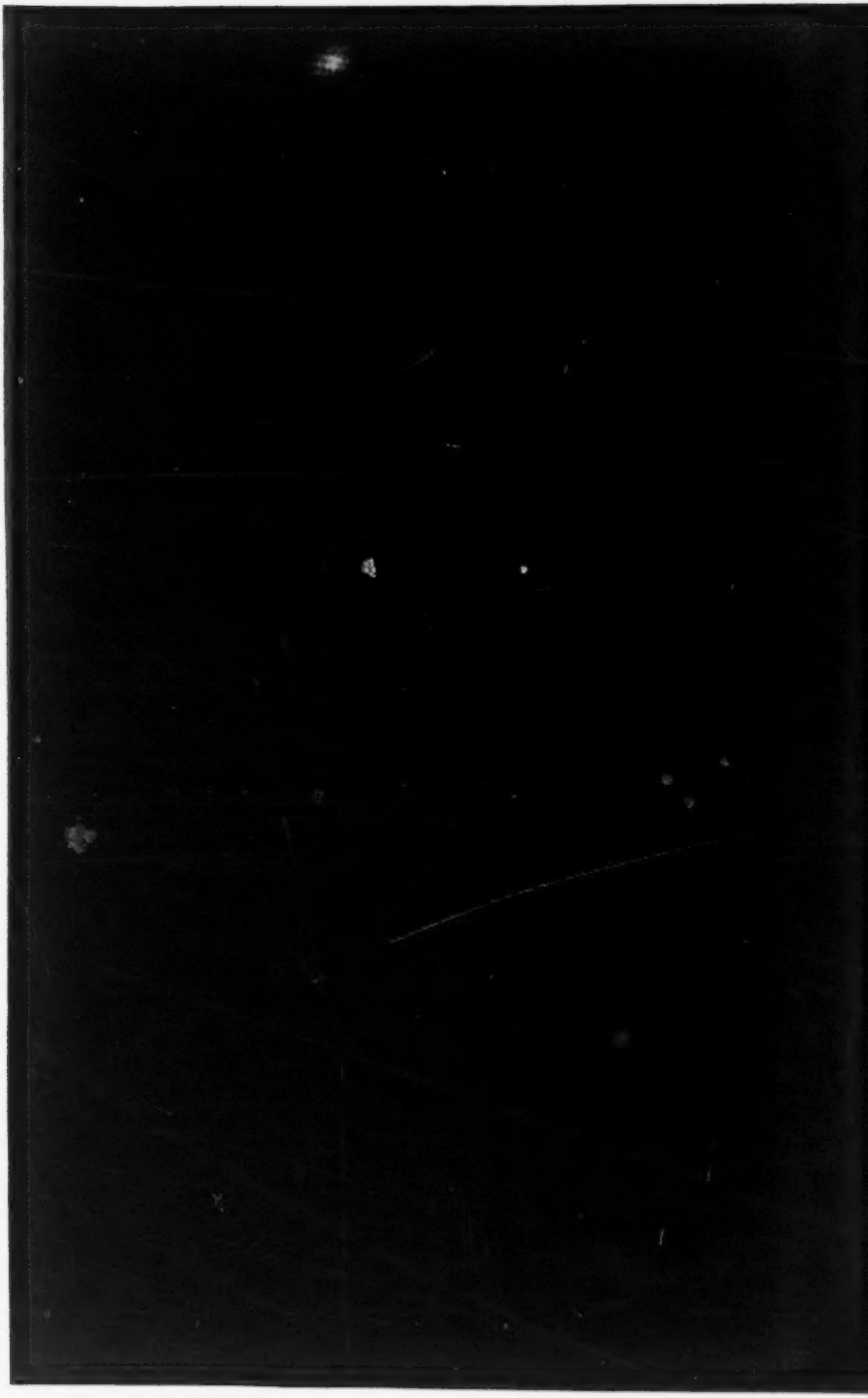
The significant difference between the *Eastern Transport* and *Rosenberg* cases and the instant case is that there the claims pleaded were predicated on an in rem liability which would have subjected the vessels to seizure had they been in existence and privately owned, and permitted a recovery in rem, whereas here the claim pleads a purely personal liability which at no time could have permitted a remedy or recovery in rem. This distinction was recognized by Judge Kirkpatrick in *Burkholder* v. *United States*, 56 F. Supp. 106 (E. D. Penn. 1944) and by Judge Dimock in the memorandum filed in this case on June 14, 1955. *Prudential S. S. Company, Matson Navigation Co., supra*, and *Aliotti* v. *United States* (C. A. 9, 1955), 221 F. 2d 589 are not to the contrary, for in each of those cases the vessel or cargo in question could have been libeled.

Thus, it is essential to the filing of a libel under the Suits in Admiralty Act that the claim be of a nature enforcible by a proceeding in rem. No libel in rem could ever have been filed here; the court would have been without jurisdiction under the statute; plaintiff's only available remedy lay at law under the Tucker Act upon a contract (*C. F. Harms Co.* v. *Erie R. R.*, 167 F. 2d 562 (CA 2, 1948)); the suit was timely filed and judgment is awarded the plaintiff. Submit decree.

SYLVESTER J. RYAN,
U. S. D. J.

May 7, 1956





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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 494

MARINE TRANSPORT LINES, INC. AND MARINE NAVIGATION COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinions of the Court of Claims, dated March 6, 1956 (Pet. App. 9a-17a), are reported at 139 F. Supp. 298 and 301, respectively. The order of the Court of Claims, dated July 12, 1956, setting aside the rulings of March 6, 1956 (Pet. 5a), is not accompanied by a separate opinion. It refers, however, to the opinion rendered on the same day in *Smith-Johnson Steam-*

ship Corp. v. *United States* (Pet. App. 6a-8a), which is reported at 142 F. Supp. 367.

JURISDICTION

The order of the Court of Claims dismissing the complaints (Pet. 5a) was entered on July 12, 1956. The petition for writs of certiorari was filed on October 9, 1956. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction over a claim which is the subject of a pending libel in admiralty filed by the plaintiff in a federal district court.

2. Whether the exclusive jurisdiction of the admiralty courts under the Suits in Admiralty Act and Public Vessels Act for suits seeking a refund of charter hire is defeated by the circumstances that the complaint is couched in the form of an action for an accounting and refers to more than one vessel.

STATUTES INVOLVED

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, provides in pertinent part (46 U.S.C. 741, 742):

> Section 1. * * * That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by

judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Section 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

Section 1500 of the Judicial Code (28 U.S.C. 1500) provides as follows:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 942.)

STATEMENT

The instant petition relates to two companion cases to *Smith-Johnson Steamship Co.* v. *United States,* No. 353 this Term, certiorari denied November 5, 1956. As

in *Smith-Johnson*, the gist of petitioners' complaints is that they had chartered from the United States certain war-built vessels under the Merchant Ship Sales Act of 1946 and the Merchant Marine Act of 1936, and that they had been overcharged because the charter hire had been computed in violation of statutory directions. The complaint of the Marine Transport Lines alleges in addition that the vessels had latent defects, that the Government had not allowed it full credit for consumable stores at the time of redelivery, and that the Government had refused to take redelivery of one of the vessels when offered, thereby subjecting petitioner to additional expense (Pet. 15a-17a).

Both petitioners filed libels in admiralty [1] as well as complaints in the Court of Claims. In the Court of Claims, the Government moved to dismiss the complaints for lack of jurisdiction on the ground that their subject matter was under the exclusive jurisdiction of the admiralty courts under the Suits in Admiralty and Public Vessels Acts. In its decisions dated March 6, 1956 (Pet. 9a-15a, 15a-17a), the Court of Claims denied these motions.

On June 11, 1956, this Court announced its decision in *Sword Line* v. *United States*, 351 U.S. 976, involving a libel in admiralty also seeking the recovery of allegedly excessive charter hire collected in violation of the mandates of the Merchant Ship Sales and Merchant Marine Acts. The Court, relying on its recent decision

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[1] Petitioner Pacific Far East Line filed a libel in admiralty in the United States District Court for the Northern District of California on July 13, 1955, and an amended libel was filed on July 30, 1956. Petitioners Marine Transport Lines, Inc., et al., filed their libel in admiralty on June 18, 1956, in the United States District Court for the District of Delaware. Copies of the two libels have been filed with the Clerk.

in *Archawski* v. *Hanioti,* 350 U.S. 532, held that the "libel though dependent on a statute, alleges unjust enrichment from a marine contract" and that consequently admiralty had jurisdiction over it.

Thereafter the Court of Claims reconsidered its ruling of March 6, 1956, in the light of this Court's decision in *Sword Line,* and by order dated July 12, 1956 (Pet. 5a), granted the Government's motions to dismiss the complaints for lack of jurisdiction for the reasons set forth in its opinion of July 12, 1956, in *Smith-Johnson S.S. Corp.* v. *United States* (Pet. 6a-8a). In *Smith-Johnson,* the Court of Claims held, under the decision of this Court in *Sword Line,* that the similar claims there presented were cognizable under the Suits in Admiralty Act and that such remedy, being exclusive in nature, precluded any jurisdiction of the Court of Claims under the Tucker Act.

ARGUMENT

1. In addition to issues which are identical with those presented in *Smith-Johnson S.S. Co.* v. *United States,* No. 353, this Term, certiorari denied November 5, 1956, petitioners here seek to raise two additional arguments to support their claims that the Court of Claims has jurisdiction to pass on their complaints. The instant cases, however, contain a jurisdictional defect not presented in the *Smith-Johnson.* The filing by the petitioners of libels in admiralty peremptorily deprived the Court of Claims of jurisdiction by virtue of 28 U.S.C. 1500 (*supra,* p. 3).

As this Court pointed out recently in *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 455, fn. 7, it is the very purpose of 28 U.S.C. 1500 to prevent hedging on the part of the litigant by the expedient of filing suits

both in the Court of Claims under the Tucker Act and in a district court under the Suits in Admiralty Act.[2]

The application of 28 U.S.C. 1500 is not defeated by the circumstance that petitioners did not file their libel in admiralty before or simultaneously with the filing of the action in the Court of Claims.[3] The policy underlying 28 U.S.C. 1500 cannot be circumvented so easily. This Court has held that the filing of a second complaint ousts whatever jurisdiction the Court of Claims might have had. Thus, a complaint filed even after dismissal in the Court of Claims is fatal to a review in this Court, *Corona Coal Company* v. *United States*, 263 U.S. 537, and it prevents a reopening of the case, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95.[4] Here both libels were filed in the district courts prior to July 12, 1956, the date of the dismissals of the com-

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[2] *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-356, provides no support to petitioners. In *Matson*, this Court held that Section 154 of the Judicial Code (28 U.S.C. (1946 Ed.) 260), the predecessor of 28 U.S.C. 1500, does not bar a suit against the United States in the Court of Claims where another suit against the United States has been filed in the district court because Section 154 referred only to suits filed against a person "acting * * * under the authority of the United States." The *Matson* decision is no longer applicable in view of the new statutory language of 28 U.S.C. 1500, expressly referring to suits against the United States in another court.

[3] In *Pacific Far East Lines, Inc.*, one of the two cases covered by the instant petition, the complaint in the Court of Claims was filed on June 17, 1955, and the original libel in admiralty on July 13, 1955. The corresponding dates in the other case, *Marine Transport Lines, Inc.*, are June 30, 1955, and June 18, 1956, respectively.

[4] While 28 U.S.C. 1500, in contrast with former Section 154 (28 U.S.C. (1946 Ed.) 260), does not in terms bar review in the Supreme Court, the Revisers' Note states that the "words 'or in the Supreme Court on appeal therefrom' were omitted as unnecessary". H. Rep. No. 308, 80th Cong., 1st Sess., p. A 140.

plaints in the Court of Claims.[5] Thus the Court of Claims, by virtue of 28 U.S.C. 1500, lost whatever jurisdiction it might have had over both complaints when the libels in admiralty were filed.[6]

2. In any event, even apart from 28 U.S.C. 1500, the Court of Claims lacks jurisdiction over these suits because their subject matter is within the exclusive jurisdiction of the admiralty courts. In this respect, petitioners concede that the two cases covered by the instant petition are largely identical with *Smith-Johnson S.S. Co.* v. *United States,* No. 353 this term, certiorari denied November 5, 1956; indeed, they rest on the argument made by petitioner in that case (Pet. 6). We shall follow their example and refer to our brief in opposition in No. 353 in order to avoid any unnecessary duplication.

Petitioners seek to distinguish their case from *Smith-Johnson,* however, by claiming that their suit is not actually one for the repayment of excessive charter hire but instead one for an accounting, and that, in addition, it refers to a number of vessels so that there is no identifiable res to which a maritime lien could attach.

a. The first contention, *viz.,* that the complaint is one for an accounting, is merely an elaboration of the argument presented without success in *American Eastern Corporation* v. *United States,* No. 934, October Term, 1955, certiorari denied, 351 U.S. 983. It is plainly without merit for, even if the form of the action be one

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[5] See notes 1 and 3, *supra.*

[6] See also *United States Lines* v. *United States,* No. 503, October Term, 1954, certiorari denied, 348 U.S. 942, in which the petition for a writ of certiorari was opposed exclusively on the ground that petitioner had filed a libel in admiralty after having commenced an action in the Court of Claims.

for an accounting, its substance is for the return of improperly collected charter hire and "[a]dmiralty is not concerned with the form of the action, but with its substance." *Krauss Bros. Co.* v. *Dimon S.S. Corp.*, 290 U.S. 117, 124; *Archawski* v. *Hanioti*, 350 U.S. 532, 533-534; see also *Sword Line* v. *United States*, 230 F. 2d 75, 76-77 (C.A. 2), aff'd, 351 U.S. 976. Just as a libel in rem lies for the collection of charter hire, so a suit for the refund of such charter hire is cognizable in admiralty. *Krauss Bros. Co.* v. *Dimon S.S. Co.*, 290 U.S. 117. Nor do the admiralty courts lack the machinery to conduct an accounting; Admiralty Rules 43 and 43½ expressly provide for the reference of suitable cases to commissioners or assessors.

b. The circumstance that petitioners chartered more than one vessel does not destroy the jurisdiction of the admiralty courts. *Sword Line* involved the charter of forty-four vessels; there too, the compensation was based upon the "cumulative net voyage profits."[7] Proper auditing methods certainly can allocate the amount of overcharge, if any, to any specific vessel if this should be found necessary. The way petitioners keep their books cannot affect the jurisdiction of the courts. If the district court decisions cited by petitioners (Pet. 11-17) contain any statements to the contrary, they are overruled by the directly applicable decision of this Court in *Sword Line* v. *United States*, 351 U.S. 976.

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[7] *Sword Line* v. *United States*, 228 F. 2d 344, 345 (C.A. 2). See also the petition for a writ of certiorari in *Sword Line*, No. 861, 1955 Term, pp. 4-5.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1956.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 494

MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1956

No. 494

MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC., *Petitioner,*

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UNITED STATES OF AMERICA.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The brief in opposition to certiorari presents a further persuasive reason for the granting of the writs. The Government relies upon 28 U.S.C. 1500 as a bar

to jurisdiction of the Court of Claims and of this Court. This poses the important question of whether an inadvertent change in language, resulting from the 1948 revision of Title 28, was intended to overrule the decision of this Court in *Matson Navigation Co.* v. *United States,* 284 U.S. 352. So far as our research discloses, this question has not heretofore been presented to this or any other Court.

Before addressing ourselves to the issue of section 1500, we discuss briefly the Government's other arguments.

I. POINTS DISCUSSED IN PETITION

1. The Government does not dispute two basic points discussed at pages 11-17 of our petition that (a) there is no jurisdiction in admiralty either *in personam* or *in rem* absent a specific identifiable vessel, and (b) there is no jurisdiction under the Suits in Admiralty Act where there could not have been a libel *in rem.*

2. The point that a suit for an accounting of profits is not within the jurisdiction of admiralty (see pages 9-11 of our petition) was not briefed in the petition for certiorari in *American Eastern Corporation* v. *United States,* 133 F. Supp. 11, aff'd., 231 F. 2d 664, certiorari denied, 351 U.S. 983. The point there urged was that the cause of action was founded upon statute and therefore was within the jurisdiction of the Court of Claims (see petition, pages 7-13, No. 934, October Term, 1955).

The Government argues that the instant suits for an accounting are, in substance, "for the return of improperly collected charter hire" (brief in opp., page 8), and therefore within the jurisdiction of admiralty. But this argument was made in the cases cited in our

petition (see, e.g., *Vanderwater* v. *Mills,* (1856) 19 How. 82). For an accounting suit always is, in substance, one for the recovery of money, as it was in those cases, and their holdings are a refutation of the argument. The cases cited by the Government are not controlling since in those cases the point was not discussed by the Court nor even briefed by the parties. We submit that precedents should not be overridden nor admiralty jurisdiction enlarged *sub silentio,* without benefit of briefs or argument.

The Government's reference to Admiralty Rules 43 and 43½ is irrelevant. These rules provide for references to commissioners or assessors. While the many things that may be referred may include the determination of a balance of an account, it does not follow that admiralty has jurisdiction of a suit for an accounting. As pointed out in *Hedger Transp. Corp.* v. *Bushey,* 155 F. 2d 321 (C.A. 2, 1946), certiorari denied, 329 U.S. 735, once admiralty has jurisdiction, that jurisdiction will not be divested because an accounting becomes incidentally necessary.

3. Absent an identifiable vessel, there is no general jurisdiction in admiralty; absent an identifiable vessel which might have been libeled *in rem,* there is no jurisdiction under the Suits in Admiralty Act.

Without controverting these propositions, the Government asserts that the cases so holding have been overruled by *Sword Line, Inc.* v. *United States,* 351 U.S. 976 (brief in opp., page 8). But again it must be pointed out that these questions were neither discussed by the court nor briefed by the parties either in the *Sword* case or in *American Eastern Corporation* v. *United States, supra.*

The Government's assertion that "[p]roper auditing methods certainly can allocate the amount of overcharge, if any, to any specific vessel", is based upon the superficially plausible assumption that the figures in an accounting, submitted in accordance with the Government's regulations, covering the operations of a number of vessels as a group, can somehow be rearranged to show how much of a total overpayment is attributable to each vessel. It is impossible, within the limitations of this brief, to discuss the various possible ways of attempting to make the allocations and to show why any such allocation would have to rest on purely arbitrary and unrealistic assumptions.

Operations under the charters here involved continued for a number of years. The charters covered groups of vessels. During the course of operations some vessels were returned to the Government and other vessels were added to the charter fleets. Periodically each petitioner submitted a tentative accounting. Some vessels may have made profits, others may have suffered losses. This would not be shown in the accounting. The accounting would show only the total income of the group of vessels less the total expenses of the group, including overhead.

The Government does not show, nor do we think it can be shown, how to identify the specific vessel on which an overpayment of charter hire was made where there was a mingling or offsetting of profits and losses among the vessels in the group. During any given year there may have been vessels that were not under charter in some other year. Some of the vessels that were under charter in one year were not under charter in another year. Vessels that had made a profit in one year may have suffered a loss the next year. Ves-

sels that had operated at a loss in one year might make a profit the second year. Obviously it is not possible to make proper allocation to each vessel of its share of any overpayment unless some arbitrary formula is adopted inconsistent with the regulations of Maritime.

The Government's suggestion that the difficulty in allocation stems from the "way petitioners keep their books" is likewise unsupported and unwarranted. The Government told petitioners how to keep their books. At pages 1b-2b of Appendix B are excerpts from the Government's accounting regulations and instructions showing that accountings were required to be prepared on the basis of fleet, and not individual vessel, operations.

In any event, the charters were fleet charters and the group accounting was required by the Government. Even if some arbitrary allocation of overpayments to specific vessels were acceptable, it would still not alter the fact that the subject of each charter was a fleet and that the accountings for which suit was brought below were, by agreement of the parties, fleet accountings.

The results of the operations of individual vessels having thus been inextricably merged in the overall results of the groups, it became impossible to allocate any part of the overpayments to any specific vessel. And, if these vessels had been chartered from private owners, there would have been no basis for a libel *in rem* for recovery of any of the overpayments.

II. 28 U.S.C. 1500 DOES NOT BAR JURISDICTION OF THE COURT OF CLAIMS OR OF THIS COURT

This section provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against *the United States or* any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

This section resulted from the comprehensive revision, in 1948, of Title 28 of the U. S. Code. The predecessor section was 28 U.S.C. 260, set forth at page 3b of Appendix B, annexed hereto. The change, in the respect here material, was the insertion of the italicized words.

The purpose of the statute

Ordinarily, the pendency of one action does not bar the maintenance of another between the same parties for the same cause. *Stanton* v. *Embry,* 93 U.S. 983 (1875); *McClellan* v. *Carland,* 217 U.S. 268 (1909); *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922); *Martin* v. *Wheatley,* 62 F. Supp. 104 (D.C. W.D. Ark., 1945); *Paluchowska* v. *United States Lines Co., Inc.,* 93 F. Supp. 751 (D.C. S.D.N.Y., 1950). Section 260 was intended to bar a suit in the Court of Claims only where another suit was pending elsewhere for the same relief against a person who was acting under authority of the United States and where a judgment in the latter case would not be *res judicata* as to the United States.

This Court, in *Matson Navigation Co.* v. *United States,* 284 U.S. 352 (1932), examined the legislative history of the original enactment and came to this conclusion. There the Court of Claims had dismissed a suit against the United States upon a claim arising out of transactions with the United States Shipping Board because the petitioner had brought separate suits against the United States in the District Court upon the same claim. This Court held that, since the purpose of section 260 was to require an election only where *res judicata* would not result, the dismissal under section 260 was improper. The Court said at pages 355-356:

> But the declared purpose of the section (originally enacted as § 8 of the Act of June 25, 1868, 15 Stat. at L. 77, chap. 71, U.S.C. title 28, § 260) was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims (Statement of Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, Cong. Globe, 40th Cong. 2d Sess. 1868, p. 2769).

The instant suits below and the libels in the District Court were all brought against the United States. A decision in either the District Court or the Court of Claims would be binding as *res judicata* on the other court and would dispose of the claim. Under the language of the old section 260 and the *Matson* decision, the pendency of the District Court suits would not oust the Court of Claims or this Court of jurisdiction in the instant cases. And the same result must obtain under section 1500 unless Congress intended, by the 1948

revision, to change the purpose and effect of section 260 and to overrule the *Matson* case.

It is clear that no change in purpose was intended and that the change in language which seems to give the section a new effect, was wholly inadvertent.

The legislative intent to effect no change in section 260

The legislative history of the 1948 revision makes it abundantly clear that substantive changes of a controversial character were deliberately avoided in the preparation of the revision. (See Appendix B, pages 3b-4b, for relevant excerpts from the legislative history.)

In the hearing before Subcommittee No. 1 of the House Judiciary Committee, Eugene J. Keogh, who was Chairman of the House Committee on Revision of the Laws, testified as follows (1948 U.S. Code Congressional Service, Special Pamphlet on Title 28, p. 1950):

> But, further, we proceeded upon the hypothesis that since that was primarly a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

Had it been intended to overrule the *Matson* holding, no one could reasonably suggest that such a change was not controversial. It would constitute a drastic modification of existing law, settled by this Court, resulting in serious prejudice to litigants, uncertain of the proper forum in which to prosecute their claims and unable to preserve their rights by protective suits. Such a change, therefore, was the very kind of change the revisers were seeking to avoid.

Ann Arbor Tp. v. *United States,* 93 F. Supp. 341 (D.C. E.D. Mich., 1950) concerned an analogous prob-

lem of jurisdiction under the Tucker Act. Reviewing the legislative history, the court rejected the argument that the 1948 revision of Title 28 had enlarged that jurisdiction, saying, at page 343:

> The framers of the revised statute adopted a policy, carefully followed by them, to "avoid wherever possible and whenever possible the adoption in our revison of what might be described as controversial substantive changes of law." (Page 381 of History.)

Moreover, the revisers were meticulously careful to have their notes explain in each case the kind of change that was being made and, if of substance, to point out in some detail the language, reason, and purpose of the change. For illustrations selected at random, see 28 U.S.C. 1359, 1493. Thus, Charles J. Zinn, Law Revision Counsel, House Judiciary Committee, stated in the hearing before Subcommittee No. 1 (1948 U. S. Code Congressional Service, Special Pamphlet on Title 28, p. 1981):

> It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law.

The authoritative weight to be given the revisers' notes is well recognized. They have been relied upon to determine that a substantive change was intended as well as that it was not. Illustrative of the former is *United States* v. *National City Lines*, 337 U.S. 78

(1948); of the latter is *Adamowski* v. *Bard,* 193 F. 2d 578, 581 (C.A. 3, 1952), certiorari denied, 343 U.S. 906, in which it was said:

> The Notes are authoritative in interpreting Title 28. See United States v. National City Lines, 337 U.S. 78, 81, 69 S. Ct. 955, 93 L. Ed. 1226. We conclude, therefore, that we are justified in presently giving to the sections the meanings which their predecessors had on January 20, 1944.

In *Affronti* v. *United States,* 350 U.S. 79 (1955) this Court had before it a question arising from the 1948 revision of Title 18. The Court, commenting on the revisers' explanation that certain words were omitted from section 3651 as unnecessary, said:

> The Revisers' Notes were used by Congress as a full explanation of all changes made in the text of the existing law. It is unlikely, therefore, that Congress intended the phrase as it appears in the present section to have a different meaning than the phrase had prior to the revision.

The revisers' notes to section 1500 disclose nothing in the nature of a substantive change in this section. They state merely that:

> Words "or in the Supreme Court on appeal therefrom" were omitted as unnecessary.
>
> Changes were made in phraseology. 80th Cong. H. Rept. No. 308.

It is clear therefore that no substantive change in section 1500 was intended and that the section was enacted by the Congress upon the premise that no substantive change was in fact being made. Had it been intended to overrule the holding in the *Matson* case, the revisers would unquestionably have adhered to

their announced practice of appending a note explaining that that was the purpose of the change. But no such explanation appears.

In statutory revision and consolidation there is a strong presumption against change in pre-existing law, absent a clearly expressed intent to make the change. *United States* v. *Ryder,* 110 U.S. 308, 312 (1883); *Ruth* v. *Eagle-Picher Company,* 225 F. 2d 572, 575 (C.A. 10, 1955); *Gulf Research & Dev. Co.* v. *Schlumberger Well Sur. Corp.,* 92 F. Supp. 16, 18 (D.C. S.D. Cal., 1950), mandamus den., 185 F. 2d 457; *Powell* v. *Utz,* 87 F. Supp. 811, 816 (D.C. E.D. Wash., 1949); *Morris* v. *Sun Oil Co.,* 88 F. Supp. 529, 530-531 (D.C. Md., 1950). Evidence of such an intent is wholly absent in the case of section 1500.

And the question now is whether inadvertent and accidental verbiage shall be given effect so as to overrule the plain legislative purpose.

Section 1500 should be construed so as to effectuate the legislative purpose

The function of a court in reading a statute is to give effect to the legislative intent. As was said in *Smythe* v. *Fiske,* 90 U.S. 47 (1874):

> A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. *People* v. *Ins. Co.,* 15 Johns., 380; *Atkins* v. *Fiber Disintegrating Co.,* 18 Wall, 301 [85 U.S. XXI., 844]; Bac. Br., tit. Stat., 1, 2, 3, 5. The intention of the law-maker is the law.

In *Markham* v. *Cabell,* 326 U.S. 404, 409 (1945), this Court reasserted this principle when it upheld Judge Learned Hand, speaking for the Second Circuit (148

F. 2d 737), in refusing "to make a fortress of the dictionary" by reading a statute literally so as to defeat the legislative purpose. See also *Cox* v. *Roth*, 348 U.S. 207, 209 (1955).

In *Gulf Research & Dev. Co.* v. *Schlumberger Well Sur. Corp., supra,* it was held that, as to whether the revision of Title 28 effected a change in existing law, the legislative intent was conclusive and that the revisers' notes, together with the evidence presented to the Congressional Committee were determinative of that intent. The court quoted from an article by Wm. W. Barron, Chief Reviser of Title 28, as reported in 8 F.R.D. 445:

> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

The court further said, at page 19:

> The hearings before the Committee clearly indicate that no change in venue statutes was contemplated by Congress except such changes as were expressly set forth in the Reviser's Notes.
>
> * * *
>
> I believe the Reviser's Notes together with the evidence presented to the Congressional Committee should be the exclusive guide to a proper interpretation and construction of the revised sections. I believe that Congress so intended.

The argument that section 1500 bars jurisdiction would, if sustained, sacrifice unquestionable legislative intent to a plainly inadvertent change in language.

CONCLUSION

In view of the highly important questions here involved, the writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX B

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Excerpts from Government's Charter Accounting Regulations

46 CFR 299.37-1(f):

> "Uniform System of Accounts" refers to the "Uniform System of Accounts for Operating-Differential Subsidy Contractors" prescribed by the Administration February 4, 1938 in General Order No. 22 (Part 282 of this chapter).

46 CFR 299.37-2(3):

> Clause 13 of Part II of WARSHIPDEMISEOUT 203 and Clause 28 of Part II of SHIPSALESDEMISE 303 provide, among other things, that the Charterer:
>
> (i) Shall keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by the agreement in accordance with the "Uniform System of Accounts" and under such regulations as may be prescribed by the Owner * * *

Excerpts from Government's Charter Accounting Instructions

Exhibit "C"—*Income Sheet*

The procedure for the preparation of this statement contemplates:

1. That there shall be submitted income sheets which accurately reflect the results of all operations (a) during the entire period commencing with the first day of the calendar month during which the first vessel is delivered under the initial bareboat charter agreement with the Commission and terminating at the end of that calendar year, and (b) for each succeeding calendar year;

2. That the income and expenses reflected on such income sheets shall be allocated among operations under

WARSHIPDEMISEOUT 203 and SHIPSALESDEMISE 303 and "other operations" on the bases prescribed in Section B of Part IV hereof; and

3. That the items of income and expense reflected in each such income sheet shall be those prescribed in the Uniform System of Accounts and none other. * * *

28 U.S.C. 260 (Prior to 1948 Revision)

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Excerpts from Legislative History of 1948 Revision of Title 28

1948 U. S. Code Congressional Service, Special Pamphlet on Title 28, page 1950:

MR. CHADWICK. Mr. Keogh, I gathered from the very able presentation of the background of your approach that it is probably undesirable at this time for us to consider changes of the substantive laws that either are or might become controversial.

This is not the time for that particular type of contribution.

Am I correct?

MR. KEOGH. You are correct. But may I take an opportunity to explain my answer a little bit?

The motivation for our seeking to avoid as far as possible controversial substantive changes was due to the basic potential conflict of the jurisdiction of the Committee on Revision of the Laws and the House Judiciary Committee. I think to a large extent, by the merger of our functions into you, that that conflict is somewhat removed.

But, further, we proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

MR. ROBINSON. And this bill does not include controversial matters?

MR. KEOGH. We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion.

page 1967:

Statement of Professor James William Moore, author of Moore's Federal Practice and special consultant on the revision of the Judicial Code

As I see it, the revision involved at least the following problems:

(1) A study of the materials contained in title 28, United States Code, and other materials that were properly related to the Federal judiciary and which should be contained under title 28.

(2) Elimination of deadwood.

(3) Improvement.

The latter might have involved far-reaching change. For example, diversity jurisdiction might have been eliminated, as many have advocated. But the revision has made no basic changes.